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No.

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ALEXANDER A. STEVAS,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
and DIRECTOR OF THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,

Petitioners,

vs.

LEWIS-WESTCO COMPANY,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

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Appendix A

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil No. 54605 (AO 15668)

Lewis-Westco & Co.,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent.

Baxter Rice as Director of the
Department of Alcoholic Beverage Control,
Real Party In Interest.

[Filed Nov. 18, 1982]
Certified for Publication

By the Court:

The opinion filed on October 22, 1982, is modified as follows:

On page 6, lines 8 and 9 of footnote 6, the following words have been deleted: analysis of the statute under the "rule of reason." In their place has been inserted: proceedings.

The petitions for rehearing are denied.

Dated: Nov. 18, 1982.

/s/

RACANELLI

Presiding Justice

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil No. 54605 (AO 15668)

Lewis-Westco & Co.,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent.

Baxter Rice as Director of the
Department of Alcoholic Beverage Control,
Real Party In Interest.

[Filed Nov. 2, 1982]
Certified for Publication

By the Court:

The opinion filed on October 22, 1982, is modified as follows:

On page 16, last line of the first paragraph after manufacturers] has been added but see United States v. United States Gypsum Co. (1978) 438 U.S. 422, which substantially restricts such limited price exchange practice.

Dated: Nov. 2, 1982

/s/

RACANELLI

Presiding Justice

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civil No. 54605 (AO 15668)

Lewis-Westco & Co.,
Petitioner,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent.

Baxter Rice as Director of the
Department of Alcoholic Beverage Control,
Real Party In Interest.

[Filed Oct. 22, 1982]
Certified for Publication

Section 24756 of the Business and Professions Code (to which all section references apply unless otherwise noted) requires every manufacturer, rectifier and wholesaler of distilled spirits to file and maintain with the Department of Alcoholic Beverage Control (Department) a written price list reflecting sales prices to retailers and to sell to retailers in compliance with the posted price list.¹

In this extraordinary writ proceeding under section 23090, we consider the validity of the price posting statute

¹Section 24756 provides: "Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. . . . Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department."

and the promulgated implementing regulations (Cal. Admin. Code, tit. 4, § 100) in light of *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431, which struck down companion retail price maintenance provisions and regulations determined to be in fatal conflict with the provisions of Sherman Antitrust Act, 15 U.S.C. section 1 et seq. For the reasons which we explain, we will conclude that the price posting provisions contained in section 24756, and implementing rule, are likewise invalid.²

The facts are undisputed. On or about July 26, 1979, petitioner, a licensed rectifier of distilled spirits, sold its products to five separate retailers at prices or quantity discounts other than as contained in price or quantity discount schedules on file with the Department in violation of section 24756 and Rule 100. The Department suspended petitioner's license for 10 days as to each count, stayed upon stated conditions. On appeal to the Alcoholic Beverage Control Appeals Board (Board), petitioner challenged the Department's order contending that Rule 100 is invalid under *Rice*, the Sherman Act, the Robinson-Patman Act (15 U.S.C.A. § 13 et seq.) and the equal protection clause. In its written opinion affirming the deci-

²Under the relevant provisions of existing Rule 100, the licensed seller or distributor of distilled spirits must file a written price schedule showing the sales price per case and the discounts offered (subd. a); the required monthly price and quantity discount schedules must be filed on or before the 15th day of the month preceding the effective date (subd. b(1)); a licensee can meet competitive prices on similar distilled spirits of a "competitive brand" (defined under subd. b(4) as a similar brand of spirits involving a price change within the range of \$3 per case of the price posted by a competing licensee) by amendment to the posted price schedule lowering prices or increasing quantity discounts provided that a competitive quantity discount may not reduce the net price of the brand, type or size container below that of the competing brand for the same quantity (subd. f); multiple brand discounts are permitted only for

sion of the Department, the Board concluded that although the price posting statute and Department rule constituted an invalid price fixing scheme under the rationale of *Rice v. Alcoholic Bev. etc. Appeals Bd.*, supra, 21 Cal.3d 431, and *Midcal Aluminum, Inc. v. Rice* (1979) 90 Cal.App.3d 979, affirmed sub nom *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97, it was nevertheless prohibited from declaring the statute unconstitutional under the provisions of California Constitution, article III, section 3.5,³ and consequently refrained from determining the validity of the derivative rule as an "idle act."

assorted brands owned or controlled by the same person (subd. g); and a licensee is prohibited from advertising or offering to sell his products at a price or quantity discount other than as provided in the posted price schedules or amendments (subd. k). (Petitioner's violations were apparently grounded on its inability to post quantity discounts for assorted brands owned by more than one person.)

While we shall make only limited references to Rule 100, our conclusions concerning the validity of the enabling statute will equally apply to the subordinate rule. (Cf. *Rice v. Alcoholic Bev. etc. Appeals Bd.*, supra, 21 Cal.3d at p. 436.)

"Section 3.5 provides: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [¶] (b) To declare a statute unconstitutional; [¶] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Petitioner now renews its challenges below seeking to annul the order of the Board.⁴

Preliminary to our discussion of the merits, we review the recent line of decisions which have considered California's price maintenance legislation for alcoholic beverages. In its benchmark decision, the California Supreme Court held that the price maintenance provisions embodied in former section 24755 (repealed by Stats. 1980, ch. 1368, § 3) which required distilled liquors wholesalers to set minimum retail prices constituted a violation of the Sherman Act neither shielded by the "state action" exception nor saved by application of the Twenty-First Amendment of the United States Constitution. (*Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d 431, 444-459.) Thereafter, in reliance on the *Rice* analysis, state courts uniformly have invalidated related price maintenance and regulatory provisions. (See *Capiscean Corp. v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [price fixing in retail sale of wine]; *Midcal Aluminum, Inc. v. Rice*, *supra*, 90 Cal.App.3d 979⁵ [price maintenance provisions for wholesale and retail sale of wine]; *Norman Williams Co. v. Rice* (1980) 108 Cal.App.3d 348 [designation statute] reversed and remanded in *Rice v. Norman Williams Co.* (1982) U.S. [73 L.Ed.2d 1042].)

⁴California Beer Wholesalers Association, a trade association of beer wholesalers, and Wine and Spirits Wholesalers of California, an association of wholesalers of distilled spirits, also sought review. Since the former made no effort to intervene below, and the latter was denied the right to intervene, neither has standing herein. (Cf. *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at p. 436, fn. 4.) Thus, while we deny the petitions to intervene, we consider the briefs previously filed as *amicus curiae*.

⁵Following issuance of its writ of certiorari upon a petition in intervention, the United States Supreme Court rendered its opinion affirming the *Midcal* decision based entirely on the reasoning advanced in *Rice* (*California Liquor Dealers v. Midcal Aluminum*, *supra*, 445 U.S. 97, 100-101, 112-114).

Petitioner argues that *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, squarely controls the issue herein; that since section 24756 sanctions horizontal price fixing among liquor wholesalers, it likewise must fall as an inseparable part of the price maintenance structure considered in *Rice*. Respondents counter that neither *Rice* nor its progeny apply herein since those decisions construed legislation dealing with vertical and horizontal price fixing as distinguished from "price posting" by licensed wholesalers. Accordingly, we consider the reasoning in *Rice* and related precedents in order to determine whether the challenged statute violates the Sherman Act and, if so, whether anti-trust immunity is afforded either under the "state action" exception announced in *Parker v. Brown* (1943) 317 U.S. 341, or by reason of the application of the Twenty-First Amendment. (See *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d 432 at pp. 439-451; see also *Rice v. Norman Williams Co.*, *supra*, U.S. [73 L.Ed.2d 1042];⁶ *California Liquor Dealers v. Midcal Aluminum*, *supra*, 445 U.S. 97, 102-110.)

It is well established that price fixing alone is illegal per se because it eliminates one form of competition. (*United States v. Univis Lens Co.* (1942) 316 U.S. 241, 252; *United States v. Trenton Potteries* (1927) 273 U.S.

⁶We reject the claim advanced by respondents and amicus that *Norman Williams Co.* implicitly restricted—if not repudiated—the holding in *Rice*. The majority in *Norman Williams Co.*, after distinguishing *California Liquor Dealers v. Midcal Aluminum, Inc.*, *supra*, dealing with a mandatory resale price maintenance activity, found no similar per se facial conflict with the Sherman Act and accordingly remanded to the California appellate court for further analysis of the statute under the "rule of reason." (73 L.Ed.2d at p. 1052.) (Cf. *Miller v. Oregon Liquor Control Com'n* (9th Cir. 1982) F.2d (No. 80-3376, July 7, 1982) [reversing finding of antitrust exception of Oregon wholesale price posting regulations on grounds of insufficient active state supervision and remanding for further proceedings relating to Sherman Act compliance and balancing of competing interests under *Midcal Aluminum*].)

392, 397.) It is equally settled that "any combination which tampers with the price structure is unlawful. Although the participants of a price fixing scheme may be in no position to control the market, to the extent that they raise, lower or *stabilize* prices they violate the act, and this is so even if the prices fixed are reasonable. [Citations.]" (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d at p. 453-454; emphasis added.) But in determining that the imposition of retail prices by producers constituted a clear violation of federal law (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d 431, 454-456), the court focused its inquiry upon the *effect* of the statutory pricing scheme rather than its form reasoning that former section 24755 "has the effect not only of allowing illegal vertical restraints on competition—i.e., resale prices specified by producers and imposed upon retailers—but horizontal restraints as well." (*Id.* at p. 454.) In view of the statistical evidence there presented reflecting a gradual and marked reduction in price differentials among liquors of the same type, the court determined that the statute clearly violated Sherman Act policy reasoning in part: "However, that there may be some interbrand competition does not detract from the circumstance that among leading brands there is a uniformity of price which persuasively demonstrates the absence of 'free and unfettered competition' in the California liquor industry. Indeed, the posting system facilitates price fixing among producers. While it may be a per se violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed.2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices. (Cal. Admin. Code, tit. 4, § 99.2, subd. (b)(2).)" (*Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal.3d at pp. 455-456.)

Thus, contrary to respondents' assertion that the *Rice* analysis is limited to vertical price fixing arrangements alone, the court underscored the anti-competitive effect resulting from the posting system's facilitation of price fixing among producers as an impermissible restraint of trade in violation of Sherman Act policy.⁷

Under the challenged statute, licensed wholesalers are required to announce their prices in advance by posting them with the Department and, under sanction of penalty, are prevented from making sales to retailers at different prices. Although in form a price posting regulation, it is not immune from antitrust analysis under *Rice* in order to determine whether an illegal price fixing restraint is otherwise manifested. Here, as in *Rice*, petitioner introduced statistical evidence demonstrating a progressive elimination of price variations between wholesalers selling the same brand and competing brands.⁸ Moreover, as the

⁷Respondents' parallel argument, relying on *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, that price posting is inherently distinguishable from price fixing is unpersuasive. First, as discussed, the mere definitive distinction does not eliminate the possibility that price posting legislation may in fact facilitate illegal price fixing. Secondly, *Ralphs Grocery* decided before the repeal of the Miller-Tydings Act and McGuire Act is of limited precedential significance in light of the subsequent *Rice* holding.

⁸For interbrand competition, in 1955, per case prices of the leading gins varied \$2.71 per case or approximately 7 percent. In 1975, the difference per case between the highest and lowest leading gin was a single cent. During that same period the case price of bourbons, excluding Ten High, narrowed from \$13.47 (14%) variance to \$.47 (1%). The leading scotch whiskeys went from a \$.50 per case variance equal to 9/10 percent to \$.29 per case variance or 3/10 percent.

For intrabrand competition, with one exception, every wholesaler who sold one of the leading brands of gin, scotch whiskey or straight whiskey charged the same per case price as his competitors.

Additionally, during the 15-month period prior to the hearing, there were only two instances where the price of one of the ana-

Board concluded, subdivision (f) of the implementing rule literally "invites periodic examination of the price lists on file" thus assuring other competitors that the filing licensee will not sell its products to anyone at a lower price. In plain effect, the mandated price posting, coupled with the regulatory compliance condition, openly sanctions and promotes an exchange of price information among competitors calculated to produce a uniform price structure vividly demonstrating the absence of free and unfettered competition in the wholesale liquor industry. (See *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at pp. 455-456.) The pernicious effect of the statutory scheme in promoting horizontal price restraints is the same whether applied to wholesale or retail price maintenance provisions; price fixing at either level is violative of the Sherman Act. (See *Midcal Aluminum, Inc.*, *supra*, 90 Cal.App. 3d at p. 983.⁹)

Accordingly, we conclude that section 24756 suffers from the same infirmity as the wholesale price posting requirements examined in *Midcal*. Consequently, the price posting statute must be declared invalid as an illegal restraint of

lyzed brands was reduced: In November and December 1979, John Walker Red and Gordon's Gin were reduced in price; during those two months every wholesaler in Northern California who handled that brand made the exact same price reduction. The following January, each increased his price to the same amount charged by their competitors.

⁹We agree with the Board's determination that the semantical distinction between a "price schedule" and "price list" noted in *Midcal* at page 985, is dictum at best. However labeled, it is the price posting system that facilitates illegal price fixing that is central to our inquiry. (*Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at p. 455.) Additionally, we observe that the Department itself equates the statutory term with "price schedules," the designation consistently employed in the implementing rule.

trade in the absence of state action exemption or constitutional protection.

Whether antitrust immunity is conferred on the price posting scheme under the doctrine of *Parker v. Brown*, *supra*, 317 U.S. 341, rests upon a determination of compliance with governing standards: first, that the challenged restraint must be clearly articulated and affirmatively expressed as state policy; second, the policy must be "actively supervised" by the state itself. (*California Liquor Dealers v. Midcal Aluminum*, *supra*, 445 U.S. 97, 105.) Assuming *arguendo* that the statutory scheme unmistakably evidences a clear legislative policy sanctioning wholesale price maintenance in satisfaction of the first prong, no similar compliance with the second prong requiring active state involvement is demonstrated. The observations of our highest federal court in its critique of a parallel California statute is aptly instructive: "[T]he State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." (*Id.*, 105-106; see also *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d 431, 445, fn. omitted.)

As petitioners correctly argues, active state involvement is as absent here as it was under the resale price maintenance program invalidated in *Rice*. Under both statutory programs, as the Board found, the state neither established its own pricing scheme nor reviewed the reasonableness of the prices set by others. The state merely provides, at public expense, a facility for the exchange of wholesale

price information among competitors resulting in a uniform price structure, a practice which stifles rather than promotes free competition. In the absence of active supervision or "pointed re-examination" by the state itself to insure that Sherman Act policies are not unnecessarily subordinated (*Rice v. Alcoholic Bev. etc. Appeal Bd.*, *supra*, 21 Cal.3d 431, 445), no antitrust immunity is extended. Nor do we comprehend the Department's insistent claim that it is the individual wholesaler who sets his own prices rather than the state or others. It is the very existence of an essentially private price fixing arrangement under statutory sanction which is repugnant to Sherman Act policies. As long declared: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action was lawful. . . ." (*California Liquor Dealers v. Midcal Aluminum*, *supra*, 445 U.S. 97, 104, 106 [quoting *Parker v. Brown*, *supra*, 317 U.S. at p. 351].)

We next consider whether section 2 of the Twenty-First Amendment of the United States Constitution¹⁰ insulates the challenged statute from Sherman Act compliance, a contention rejected by the Board for the reasons stated in *Rice* and *Midcal*. We are similarly persuaded.

Whether the statutory scheme may be sustained under the protection of the Twenty-First Amendment requires a balancing process in order to determine what policies are furthered by the statute, whether the price posting provisions clearly vindicate those policies, and whether and to what degree the Sherman Act policy is undermined by that statutory program. (*Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at p. 451.) Although the Amend-

¹⁰Section 2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

ment grants to states virtually complete control in regulating the sale of liquor and structuring in liquor distribution system, such control is not absolute and remains subject to overriding federal interest in the regulation of interstate commerce. "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' [Citation.]" (*California Liquor Dealers v. Midcal Aluminum, supra*, 445 U.S. 97, 110.) We believe that the *Rice* rationale relating to the state's interest in retail price maintenance provisions is equally applicable and controlling in the context of a wholesale price posting program. Both sections were enacted as a part of Chapter 10 of the Alcoholic Beverage Control Act for the same legislative purposes: to promote temperance and orderly marketing conditions (§§ 24749, 23001; *Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, p. 451.)¹¹

By analogy to *Rice* we similarly find no compelling justification for the horizontal restraints created by the wholesale price posting statute which tend to eliminate

¹¹We reject respondents' contention that the challenged statute was enacted to prevent price discrimination proscribed by section 25503, subdivision (e), thus justifying the anti-competitive effect of the price posting program. The price discrimination measure, enacted after section 24756, is found in an entirely different chapter (15) of the Alcoholic Beverage Control Act for the wholly different purpose of maintaining the independence of the tripartite levels of distribution provided under the Act. (See *California Beer Wholesalers Assn, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407-412.) Nor do we find the holding in *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, applicable as contended. *Schenley*, which then assumed the validity of price fixing legislation, dealt with an earlier version of Rule 100 concerning the types of permitted assortments by wholesalers and the prohibition of "tie-in" sales for discount purposes; there is no suggestion in *Schenley* that section 24756 was intended either to implement or supplant section 25503.

free competition. There is no showing that price posting actually protects small retailers. Indeed, the studies considered in *Rice* suggest that price posting provides the small retailer with little protection, if any, from discriminatory pricing practices at the wholesale level. Conversely, there is no reason to assume that price posting is necessary to the effective policing of discriminatory price practices under the provisions of the Robinson-Patman Act. As earlier discussed, there is eloquent proof that price posting actually results in serious impairment of price competition in the wholesale liquor industry. While it is arguable that price posting may provide useful information to the consumer retailer who might otherwise be subject to predatory practices, it seems clear that it is only in a noncompetitive setting that the protection of wholesale price posting would even be required. Ironically, it is the price posting scheme *itself* which tends to create a noncompetitive environment which would conceivably justify whatever protection is afforded the retailer through such accessible information. In convoluted result, the price posting statute provides a remedy for an ailment which it itself creates.

Finally, it is doubtful whether the small retailer would gain any competitive advantage through the posting of quantity discounts which as a practical matter would be available only to larger retailers. Nor does the circumstance that the narrowing of prices to lower levels thus minimizing the burden imposed upon retailers justify the anticompetitive effect of price posting. To reiterate, the major economic premise underlying the Sherman Act is the promotion of free competition; any restraint on trade which *raises, lowers or stabilizes prices*, is prohibited. (*United States v. Sacony-Vacuum Oil Co.* (1940) 310 U.S. 150, 222.)

Nor is it reasonable to conclude that the wholesale price posting program is likely to promote temperance. (See

Rice v. Alcoholic Bev. etc. Appeals Bd., *supra*, 21 Cal.3d 431, pp. 457-459.) Again, it is conjectural at best whether the anticompetitive effect of price posting would trigger higher wholesale prices and consequent higher retail prices so as to cause a perceptible decrease in consumption demands. As *Rice* teaches, there is little evidence to suggest that price maintenance legislation significantly contributes to reduced consumption of alcohol. (*Id.*, at p. 457.) Such doubtful benefit is inadequate to override the significant objectives of the Sherman Act (*California Liquor Dealers v. Midcal Aluminum*, *supra*, 445 U.S. 97, 114; *Rice*, *supra*, p. 458.)

Moreover, alternative means to accommodate state concerns compatible with the objectives of the Sherman Act could be readily fashioned. Obviously, the establishment of a truly competitive market, permitting access to retailers of independent wholesale prices, would enable purchases at the best possible price. Additionally, a more limited exchange of presale price information among wholesalers arguably would result in minimal anticompetitive effects within the industry while providing wholesalers and retailer with adequate price information without risk of predatory price practices. Such limited exchange in order to further adherence to the Robinson-Patman Act would appear consonant with Sherman Act precepts. (See e.g., *Wall Products Co. v. National Gypsum Co.* (N.D.Cal. 1971) 326 F.Supp. 295 [permissible price verification among gypsum manufacturers].)

In conclusion, we hold that consideration of the relevant balancing factors compels a determination that the policies underlying the Sherman Act are paramount and that the price posting scheme embodied in section 24756 and the implementing rule are invalid. (*California Liquor Dealers v. Midcal Aluminum*, *supra*, 445 U.S. 97, 114; *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d 431, p. 459.)

In view of our determination, we need not reach the remaining issues raised in the briefs.¹²

The order of the Board below is annulled. The petitions to intervene as real parties are dismissed.

Certified for publication

/s/ RACANELLI
Racanelli, P.J.

We concur:

/s/ ELKINGTON
Elkington, J.

/s/ NEWSOM
Newsom, J.

¹²While it is unnecessary to discuss the question of the Board's authority to declare the subject statute unenforceable by reason of the restrictions imposed under California Constitution, article III, section 3.5, we assume, arguendo, that the explicit constitutional language would prohibit such an administrative adjudication as determined below. However, we agree with the Board that, as a general proposition, such prohibition on constitutional grounds would not affect an administrative agency's power in the enforcement of its own rules. (See *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669, fn. 18.)

Appendix B

Before the Alcoholic Beverage Control Appeals Board
of the State of California

AB-4877

File No. 48292; Reg. 12952

ALJ: Philip Sarkisian (f:c)

Date and Place of Hearing:

September 3, 1981

350 McAllister Street

San Francisco, CA

Appearances on Appeal:

For Department:

Hon. George Deukmejian

Attorney General

Matthew Boyle

Deputy Attorney General

For Appellant:

Daniel Leraul, Attorney

In the Matter of the Accusation Against:

LEWIS WESTCO AND COMPANY

3003 Third Street

San Francisco, CA 94107

Licenses: still, rectifier, beer and wine importer,

distilled spirits importer,

and beer and wine wholesaler

Under the Alcoholic Beverage Control Act.

[Filed Dec. 17, 1981]

Lewis Westco and Company has appealed a decision of the Department of Alcoholic Beverage Control which determined that the licensee violated Business and Professions Code 24756 and § 100, Title IV of the California Administrative Code as to each of Counts I, II, III, IV and V.

That because thereof, grounds for discipline exist as to each count pursuant to Business and Professions Code § 24200, subdivisions (a) and (b), and § 22 of Article XX of the California Constitution. The department further determined:

"1. Respondent has challenged the validity and enforceability of rule 100 on various grounds. Section 3.5 of article III of the California Constitution provides as follows:

"Section 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.'"

"This provision of the California Constitution prohibits the Department of Alcoholic Beverage Control from declaring rule 100 invalid. For this reason, respondent's objections to the validity of rule 100 are overruled."

Because of the above violations, the department ordered that appellant's license be suspended for 10 days as to each count; provided, however, that execution of the suspension shall be stayed upon the condition that no subsequent cause for disciplinary action occur within one year from the effective date of the department's decision. It was further ordered that the suspensions shall run concurrently.

The department's decision further provides:

"Findings of Fact:

"I

"Count I

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to B. T. DeGeorge, dba Say Cheese, 1118 Meridian Road, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19222</u>
(a) Two cases of Seagram's V. O. Canadian Whisky, 86.8 proof, quart bottles, 6 years old	0	\$5.00
(b) One case of Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(c) One case of Canadian Club Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(d) Two cases of Ron Bacardi Superior Puerto Rican Rum (silver label), 80 proof, 1.75 liter bottles	0	8.00
(e) One case of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(f) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) One case of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(h) One case of Seagram's Crown Royale, Canadian Whisky, 80 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"II

"Count II

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Leland R. and Sally C. Chew, dba South Shore Liquors, 549 W. Plaza, Alameda, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19226</u>
(a) Four cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	\$5.00
(b) One case of Ron Bacardi Superior Puerto Rican Rum (Silver Label), 80 proof, 1.75 liter bottles	0	8.00
(c) Two cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, quart size bottles	0	5.00
(f) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(g) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"III

"Count III

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Best Buy Bottles, Inc., 6111 Meridian Avenue, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19219</u>
(a) Three cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	\$5.00
(b) Three cases of Canadian Club, Imported Canadian Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) Two cases of Wild Turkey, Straight Bourbon Whiskey, 101 proof, 750 ml. size bottles	0	5.00
(f) One case Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"IV

"Count IV

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to M. Beacon & A. Domingo, dba Village Bottle Shop—R.C., 504 El Camino Real, Redwood City, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19221</u>
(a) Six cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	\$5.00
(b) Two cases of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00
(d) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(e) Two cases Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter size bottles . .	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"V

"Count V

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Erika and John Davis, dba Skyline Bottle Shop, 11893 Skyline Boulevard, Oakland, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19214</u>
(a) One case of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	\$5.00
(b) One case of Liqueure Galliano, Liqueur, 70 proof, 23 oz. size bottles	0	5.00
(c) Three cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles . . .	0	5.00
(d) One case of Hennessy Bras Arms, Cognac V.S., 80 proof, 750 ml. size bottles . .	0	5.00
(e) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(f) One case of Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) Five cases of Seagram's V.O. Canadian Whisky, 86.8 proof, quart size bottles . .	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"VI

"Respondent has been licensed as indicated above since April 26, 1965. There is no record of any disciplinary action against the respondent."

This appeal is based on the grounds that the Department of Alcoholic Beverage Control proceeded in excess of its jurisdiction and that it did not proceed in the manner required by law.

At the department hearing, evidence (invoices of sales) was presented by the department in support of the violations set forth in the accusation that the licensee herein did sell distilled spirits to designated retail licensees at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of ABC (Department's Exhibits 1 through 5).

The facts of this case are not in dispute on appeal.

Appellant does, however, raise the following legal issues:

Article III, § 3.5 of the California Constitution only limits the department's authority to review the validity of statutes and does not alter the department's duty to review the validity of a department rule (100).

Rule 100 is invalid because it is based upon a statute found by the Supreme Court to be invalid.

Rule 100 is invalid because it conflicts with numerous precedent legal principles: (a) Rule 100 violates federal anti-trust policy by requiring disclosure of future price information which tends to eliminate price competition; (b) Rule 100 is invalid because it sponsors illegal tying of products in restraint of trade; (c) Rule 100 is invalid because it sponsors price discrimination, which violates the Robinson Patman Act.

"Rule 100 exceeds the department's authority because it fixes prices and thereby eliminates price competition for 60-day periods.

"Rule 100 is invalid because the Department of ABC has no authority to control assortments, other than California Brandy.

"Rule 100 is invalid because it denies equal protection to smaller wholesalers and distillers and creates an arbitrary classification unrelated to any legitimate interest of the state."

Ruling on Petition for Intervention

Wine and Spirits Wholesalers of California, a California corporation, which allegedly consists of members who sell over 80 percent of the distilled spirits sold to the retailers of California, and who claim to be directly affected by instant litigation, have filed a Petition for Intervention as a party with the board in this matter.

Article XX, § 22 of the California Constitution states "When any person aggrieved from a decision of the department . . .", while Business and Professions Code § 23081 refers to ". . . Any party aggrieved by a final decision of the department may file an appeal with the board from such decision." In addition, § 194, Title 4 of the California Administrative Code recites: "Permission to file briefs by persons other than the parties to the appeal may be granted upon written request."

In seeking resolution of the issue, consideration is also given to the holding by the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board and Corsetti*, 21 Cal.3d 431, 436 (fn. 4), as to those who sought to intervene in the review of a board decision before that court. It stated:

"Youngs Market Company and other wholesale distributors of alcoholic beverages (Young's) also sought review. However, their petition must be denied because they were not parties to the proceedings before the board.

Under Article XX, § 22, of the California Constitution, orders of the board are subject to judicial review "upon petition of . . . any party aggrieved by such

order.” Section 23090 allows “any person” affected by a final order of the board to apply for a writ of review. However, § 23090.3 states that the “board . . . and each party to the action or proceeding before the board shall have the right to appear in the review proceeding,” and under § 23090.4, a copy of the pleadings must be served “on each party” who appeared before the board.

We hold that these provisions read as a whole, limit the right of review of the board’s decision to parties who appeared before the board. This limitation is consistent with the rule followed by appellate courts in reviewing the action of trial courts. In such cases a person who is not a party of record to the proceeding below has no standing to appeal. (*Eggert v. Pac. States S.&L. Co.* (1942) 20 Cal.2d 199 [124 P.2d 815]; *City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 782 [69 Cal.Rptr. 830]; *People v. United Bonding Ins. Co.* (1969) 272 Cal.App.2d 441, 442 [77 Cal.Rptr. 310].) Young’s Market did not appear below and therefore has no right to seek review here.”

Upon comparison, it is clear that the words “any person aggrieved” and “any party aggrieved”, used with reference to appeals filed with the board, are similarly used, interchangeably, when review of a board decision is sought before an appellate court. It could thus be consistent, under the reasoning of the Supreme Court, to conclude that only *parties* who appeared at the department hearing have the right to appeal a decision of the department to this board.

The petitioner does assert that board Rule 194, *supra*, is of no assistance to it, due to the fact that this rule pertains only to the filing of an amicus curiae brief (Memo in Support of Petition, p.12).

While petitioner refers to a liberalization of Code of Civil Procedure § 387, by amendment in 1977, petitioner admits that there is no similar wording on intervention in administrative proceedings; that neither statutory nor case law specifically answers the question presented (Memo in Support of Petition, pp.3-4). Moreover, appellant admits it is not yet aggrieved under a decision of the department; that it would be only if the appeals board should rule adversely as to the statute and/or rule involved.

Under the circumstances, we conclude that petitioner does not have the right to intervene as a party in this appeal before the board. The Petition for Intervention is denied. The brief of Wine and Spirits Wholesalers of California will be received, however, as that filed by an amicus curiae (§ 194, Title 4, California Administrative Code, *supra*).

In addition, on October 19, 1981, a Motion to Consolidate this matter with the appeal of *Mutual Wholesale Liquor, Inc.* (AB-4896, File 50085, Reg. 15618), which involves similar issues, was filed with this board. Oral argument as to both of these cases was heard by the board on September 3, 1981 and they were taken under submission at that time. Hence, the Motion to Consolidate is denied, as not timely filed. Moreover, the board has no express authority in this regard, like that conferred upon a court by Code of Civil Procedure § 1048.

Ruling on Appeal

Appellant (rectifier) was determined to have violated Business and Professions Code § 24756 and § 100, Title 4 of the California Administrative Code for selling distilled spirits to a retail licensee at a price or quantity discount at other than the price or quantity discount contained in schedules on file with the department.

In *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, the California Supreme Court held that the price maintenance program relating to the retail sale of distilled spirits violated the Sherman Act. Subsequently, the U.S. Supreme Court upheld a California Court of Appeal decision, which ruled that California's wine pricing system constituted retail sale price maintenance in violation of the Sherman Act. (*California Retail Liquor Dealers Assn. v. Mid-Cal Alum.*, 90 Cal.App.3d 979, 100 S.Ct. 937.)

Business and Professions Code § 24756¹, and § 100 Title 4 of the California Administrative Code², which

¹Business and Professions Code § 24756 provides:

"Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. Domestic brandy shall not be assorted with other distilled spirits for quantity discounts, except that imported brandy, upon which duty is paid, may be assorted for quantity discounts only with imported distilled spirits upon which duty is paid. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department."

²Section 100, Title 4, California Administrative Code provides:

"(a) Each manufacturer, rectifier or wholesaler who sells or distributes distilled spirits in this State to retailers shall file and maintain with the department, in triplicate, and in such form as the department may prescribe, a written price schedule showing the price per case at which distilled spirits will be sold or distributed, and the discounts offered by such person to retail licensees within the State.

"Such schedules shall be filed by eligible licensees at the time their license is issued and before any sales are made, and shall be effective immediately upon filing with the department at its headquarters office, 1215 O Street, Sacramento 94814. When a manufacturer, rectifier or wholesaler license is transferred from one legal entity to another, new price posting and quantity discount schedules shall be submitted by the new

appellant was determined by the department to have violated, require every manufacturer, rectifier and wholesaler to file and maintain with the department a price list

licensed entity before any sales are made. Such schedules shall become effective immediately upon filing with the headquarters office of the department.

"Distilled spirits single case price posting schedules and quantity discount schedules once filed with the department will remain in effect until superseded or withdrawn by a superseding schedule.

"(b) Definitions.

"(1) The term "posting period" as used herein shall be one calendar month. A complete new schedule of prices and quantity discounts shall be filed every month on or before the fifteenth day of each month to become effective on the first day of the following month. Each new product, price and discount change from the previous month shall be underlined, and each such schedule shall be preserved by the filing licensee for a period of one year and made available to the department for its inspection during business hours.

"(2) The word "brand" as used herein means "brand, trademark, label or name", as shown on the primary label, and if an additional secondary name or a different shape or color of label is used, each will be considered to be a separate brand.

"(3) The "same type" of distilled spirits is one identical in all of the following categories: (A) type of distilled spirits, including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (B) percentage of straight whiskey; (C) age, if shown on the label; (D) proof; (E) origin (domestic or imported); (F) bottle size; and (G) number of bottles in a case.

"(4) A "competitive brand" is a brand of the same type of distilled spirits for which a change in price is being filed and for which there is on file a price schedule sheet filed by some other licensee showing a price per case for the competitive brand which is within three dollars (\$3) per case of the price being charged by the licensee filing the competitive posting.

"(5) "Trade journals" or "industry price books of general circulation" are trade journals or industry price books published for the dissemination of information of interest to persons selling, dealing in, distributing, producing, manufacturing, dispensing, possessing for resale, or transporting alcoholic beverages.

showing the prices at which distilled spirits are to be sold to retailers. For the reasons set forth in the two above cited cases, § 24756 and § 100, *supra*, would also appear to

ages, which publications have bona fide subscription lists of paying subscribers, and which have been established, printed, and published at regular intervals in this State for at least one year.

"A list of publications determined by the department to qualify as trade journals or industry price books of general circulation may be obtained from the Sacramento office of the department. Publications desiring to be determined as constituting trade journals or industry price books of general circulation in this State may petition the department for such a determination.

"For the purposes of this rule, interstate common carriers and purchasers located on military and federal reservations are not to be deemed "retailers".

"(c) Amendments to price schedules may be deposited in the United States mail, addressed to the department, or placed on file in the Sacramento office of the department on or before the fifteenth day of December, February, April, June, August or October, to become effective on the first day of the posting period following the filing thereof. Such amendments to price schedules shall not be available for public review until on or after the sixteenth day of the month in which they are submitted, except that when the provisions of paragraph (1) below apply, the schedules shall be available for review on the first working day after the filing date is determined by that paragraph.

"(d) No manufacturer, rectifier or wholesaler of distilled spirits shall file a price schedule on which is shown a selling price per case at less than the cost thereof to such manufacturer, rectifier or wholesaler, in violation of the California Unfair Practices Act.

"(e) Prices may be filed below the manufacturer's, rectifier's or wholesaler's cost, as defined in the California Unfair Practices Act, when such prices are filed to meet, in good faith, legal prices filed with the department on similar distilled spirits by a competing manufacturer, rectifier or wholesaler.

"(f) Manufacturers, rectifiers or wholesalers can meet competitive prices on similar distilled spirits of a "competitive

be invalid. Section 24756, as well as Rule 100, are an integral part of the liquor price maintenance laws discussed in *Rice* and *Midcal*, *supra*. Because of these prior

brand" of distilled spirits by depositing in the United States mail addressed to the Department, or placing on file in the Sacramento office of the department on or before the fifteenth day of any posting period an amendment to their effective price schedule which lowers their price or prices per case or increases their quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for a similar item of the competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective. Manufacturers, rectifiers or wholesalers can meet competitive prices on the same brand, type and size container of distilled spirits by amending their effective price schedule at any time to become effective at the same time the competitive price for the same brand, type and size of container shall become effective, or immediately if such competitive price schedule shall have become effective. Competitive schedules expire at the end of the posting period in which they were effective.

"A quantity discount filed to meet competition may not be filed in an amount that would reduce the net price of the brand, type or size container below the net price of the competitive brand for the same quantity.

"(g)(1) A quantity discount may be offered on a sale of two or more cases, whether original cases or assorted cases, and on each package in excess of two cases on a pro rata basis, except that imported distilled spirits, upon which duty is paid may not be assorted with domestic distilled spirits, and domestic brandy may not be assorted for discount with any other type of distilled spirits.

"The following containers are substantially the same size and for the purposes of quantity discounts are interchangeable: one half-gallon with 1.75 liters, one quart with one liter, one fifth with 750 milliliters, 24 ounces with 750 milliliters, one pint with 500 milliliters, one tenth with 500 milliliters, and one half-pint with 200 milliliters.

"(2) All postings, including quantity discount schedules, are public records.

court decisions, the statute and rule before us are a part of the few remaining laws on the subject. As previously stated, § 24756 requires the filing of a price list at which

“(3) Quantity discounts filed must be understandable and enforceable by the department. Quantity discounts filed in conformity with any of the following three schedules will be presumed to be understandable and enforceable:

“(A) Schedule A, Brand Discounts. Quantity discounts may be filed for a single brand. All sizes of the brand are assortable, if so specified. The brand may not assort with another brand in this schedule.

“The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules B and C.

“(B) Schedule B, Multiple Brand Discounts. Quantity discounts may be filed for brands of distilled spirits owned or controlled by the same person when grouped together in the schedule at the same or different discount rates than in Schedules A or C.

“The brands and sizes filed in this schedule may also be combined into one or more assortments of brands and sizes as specified. However, if a brand is included in more than one Schedule B assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

“No Schedule B assortment shall be used or combined for quantity with any other Schedule B assortment.

“The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules A and C.

“(c) Schedule C, Special Size Discounts. Quantity discounts may be filed for a single brand or brands of distilled spirits owned or controlled by the same person for not more than any two sizes at the same or different discount rates than in Schedules A or B.

“If a brand and size is included in more than one Schedule C assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

“No Schedule C assortment shall be used or combined for quantity with any other Schedule C assortment.

distilled spirits are sold to retailers. The appellate court in *Midcal*, supra, stated:

"Under Business and Professions Code § 24862 no licensee may sell or resell to a retailer, and no retailer

"No Schedule C assortment shall be used or combined for quantity with those discounts filed in Schedules A and B.

"Filing licensees are to indicate directly below each schedule all explanatory statements they consider applicable to that posting such as: sizes assort; sizes do not assort; brands and sizes assort; brands and sizes do not assort.

"Any quantity discount which does not conform to the schedules set forth above shall be separately filed and clearly identified no later than the first day of December, February, April, June, August or October to be effective on the first day of the next posting period.

"If the filing is found to be defective, it will be rejected, setting forth the reasons for the rejection.

"(4) Tie-in sales are prohibited. No discount, or any portion thereof, on any distilled spirits in any quantity or quantities, shall in any way, directly or indirectly, be predicated upon, or conditioned upon, the purchase of any other distilled spirits.

"(5) Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way, directly or indirectly, disseminates distilled spirits quantity discount information for any brand, to retail licensees served by him, shall, in any such material, include all quantity discounts filed by him for such brand. If a filing licensee so publishes, mails, delivers, distributes, advertises or in any other way, directly or indirectly, disseminates such information on all quantity discounts filed by him for any brand, he shall disseminate such information to all retailers served by him.

"(6) The publication, mailing or delivering of any written material containing less than all of the quantity discounts posted for any brand by a filing licensee shall be deemed a violation of this rule.

"(7) The mailing or delivering of written lists of quantity discounts to selective retail licensees rather than to all such licensees served by the filing licensee shall be deemed a violation of this rule.

"(8) The publication of all quantity discount schedules filed with the department by a filing licensee, on or before the effective date thereof, in one or more trade journals or industry

may buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to

price books of general circulation among retail licensees in this State, or in parts or trading areas of this State, shall be deemed sufficient compliance with the provisions of subparagraphs (5), (6) and (7) of this paragraph.

"(9) Notification to retail licensees of quantity discount schedules by a method other than by publication in a trade journal or industry price book shall be accomplished on or before the effective date of such quantity discount schedules.

(10) The quantity discounts on a brand sold only to one retailer need not be published.

"(h) A quantity discount sale is a single order for delivery within two consecutive business days to a licensed retailer at the premises of the distributor, or to the same premises of the licensed retailer at the discount in effect on the day the delivery was commenced. Saturdays, Sundays and holidays are not to be deemed as business days.

"(i) In the computation of quantity discounts the word "case" as used in this rule shall mean: 3 full gallons, 6 half-gallons, 12 quarts, 12 packages containing more than one pint but not more than one fifth, 24 packages containing more than one-half pint but not more than one pint, and 48 half-pints. When packages are in metric sizes, "case" shall mean: 6 as to 1.75 liter, 12 as to liters or 750 milliliters, 24 as to 500 milliliters, and 48 as to 200 milliliters.

"(j) Any manufacturer, rectifier or wholesaler may at any time file with the department written price schedules showing the price per case and the quantity discount offered on any new brand of distilled spirits, or on any distilled spirits which are not the "same type" as those currently on file by that licensee, to become effective immediately.

"(k) No manufacturer, rectifier or wholesaler shall advertise or offer for sale or sell distilled spirits to retailers at a price or quantity discount other than the price or quantity discount provided for by his price schedules or amendments thereto on file with the department.

"(l) Whenever the fifteenth day of the month falls on a Saturday, Sunday or a legal holiday, the distilled spirits price schedules required to be placed on file in the Sacramento office of the department may be filed or placed in the United

sell or resell to any consumer any item of wine at less than the selling or resale price contained in an effective price schedule or fair trade contract.

Under § 24866 each grower, wholesaler and wine rectifier must make and file fair trade contracts and/or file schedules of the resale prices of wines. These sections result in price fixing in wine identical to that found to be repugnant to the Sherman Antitrust Act when applied to distilled spirits. (See *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at pp. 445-446; see also, *Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [151 Cal.Rptr. 492], holding the price maintenance provisions relating to the retail price of wine to be invalid under *Rice*.) Our consideration is controlled by the reasoning of the Supreme Court in *Rice*. Unless there appears an independent basis for upholding the fair trade laws relating to wine we must declare those laws to be invalid." (90 Cal.App.3d 979, 993.)

Section 24866, *supra*, is similar to § 24756. § 24866 was related to Business and Professions Code § 24862, as § 24756 bore a relationship to § 24755, which was declared invalid in *Rice*, *supra*. Furthermore, in *Rice*, *supra*, with reference to there being a uniformity of price among leading brands of liquor under the retail price maintenance system in California, the court stated:

States mail addressed to the department not later than the close of the next business day.

"(m) Pursuant to an order issued by the department, any distilled spirits price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements or any order issued by the Federal Government relating to price control.

"(n) If any paragraph, sentence, clause or phrase of this rule is for any reason declared invalid, such decision shall not affect the validity of the remaining provisions of this rule."

"Indeed, the posting system facilitates price fixing among producers. While it may be a per se violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed. 2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices. (Cal Admin. Code, Title 4, § 99.2, subd. (b)(2).)" (23 Cal.3d 431, 455.)

An identical situation exists by virtue of § 24756 and Rule 100—the required posting with the department a price list showing the prices at which distilled spirits are to be sold to retailers, provides a depository whereby competitors (manufacturers, wholesalers) can and do exchange price information on a regular basis. Indeed, the rule invites periodic examination of the price lists on file with the department. Subsection (f) of Rule 100 provides in part:

"(f) Manufacturers, rectifiers or wholesalers can meet competitive prices on similar distilled spirits of a "competitive brand" of distilled spirits by depositing in the United States mail addressed to the Department, or placing on file in the Sacramento office of the department on or before the fifteenth day of any posting period an amendment to their effective price schedule which lowers their price or prices per case or increases their quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for a similar item of the competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective. Manufacturers, rectifiers or wholesalers can meet competitive prices on the same brand, type and size container of distilled spirits by amending their effective price

schedule at any time to become effective at the same time the competitive price for the same brand, type and size of container shall become effective, or immediately if such competitive price schedule shall have become effective. Competitive schedules expire at the end of the posting period in which they were effective."

Thus, the statute and rule in question are a part of the scheme for the fixing of prices.³

Moreover, § 24756, *supra*, by use of the words that "sales of distilled spirits to retailers . . . shall be made in compliance with the price lists of the licensee on file with the department", serves to assure and protect other competitors that the one filing the price list will not sell to anyone at a lesser price.

No state action is here involved. As existed in the cited prior decisions pertaining to price maintenance (*Rice* and *Midcal*, *supra*), the state does not establish its own pricing scheme nor review the reasonableness of the prices set by others. In this instance, the state merely provides, at the taxpayer's expense, a facility for the checking of prices by competitors. It serves no other purpose. The state's only "action" is in facilitating the exchange of such information, which results in a uniformity of prices—a practice which stifles rather than promotes competition.

The Twenty-first Amendment of the United States Constitution provides no basis for upholding the statute and rule in question, for the same reasons enunciated in *Rice* and *Midcal*, *supra*.

³While the court in *Midcal*, *supra*, 90 Cal.App.3d 979, 985 makes a distinction between the filing of a "price schedule" and "price lists", this would appear to be a distinction without a difference. Furthermore, it is dicta, rather than a ruling that a "price list" would not result in price fixing.

The appeals board is, however, prohibited from declaring a statute unconstitutional (§ 3.5, Article III, California Constitution). While this constitutional provision would not (contrary to the department's determination) seem to prohibit the appeals board from declaring the rule invalid (see *Goldin v. Public Utilities Commission*, 23 Cal.3d 638, fn.18), we refrain from doing so inasmuch as it would be an idle act. As stated in *Rice*, supra, the court's conclusion regarding the validity of § 24755 would also apply to the department's rule implementing the section (21 Cal.3d 431, 436 [fn.2]). In this instance, the department rule (see par. (a), § 100, Title 4, California Administrative Code, supra) is based upon and contains provisions like those in § 24756, which appellant was determined to have violated. Hence, the validity of the rule is dependent upon a determination as to the validity of the statute.⁴ Declaring the rule invalid would be tantamount to declaring unenforceable its enabling statute, which is prohibited by § 3.5, Article III of the California Constitution. For these reasons, the decision of the department is affirmed.

Jacob F. West, Chairman
Alcoholic Beverage Control
Appeals Board

Members concurring:

James S. Lee
Eduardo Sandoval

⁴A similar position was taken by the board in *Capiscean Corp.*, AB-4490 and *Ferrigno*, AB-4673.

Litigation challenging the validity of the pertinent provisions is currently pending before the U.S. District Court of Northern California (*Enrico's, Inc. v. Rice*, C-81-0068 SC).

Appendix C

State of California
Department of Alcoholic Beverage Control
Certificate of Decision

File 48292

Reg. 12952

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Office of Administrative Hearings, adopted said proposed decision as its decision in the case therein described on December 26, 1980.

Sacramento, California

Dated: December 26, 1980

BEATRICE SMALLEY
Hearing and Legal Unit

State of California
Department of Alcoholic Beverage Control

100 Folios

File 48292

Reg. 12952

Licenses: 06, 07, 09, 12, 17

Time of Hearing: October 6, 1980

Place of Hearing: San Francisco, California

Reporter: Albert Levy N 14920

Appearances:

For the Department:

Donald L. Tipton, Counsel

For the Respondent:

Leland, Parachini, Steinberg,

Finn, Matzger & Melnick by

Daniel Leraul, Attorneys

220 Bush Street

San Francisco, CA 94104

In the Matter of the Accusation
against

Lewis-Westco & Co.

3003 Third Street

San Francisco, California

Still, Rectifiers, Beer & Wine Importer,
Distilled Spirits Importer and Beer & Wine Wholesaler
under the Alcoholic Beverage Control Act.

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

"Findings of Fact:

"I

"Count I

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to B. T. DeGeorge, dba Say Cheese, 1118 Meridian Road, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19222</u>
(a) Two cases of Seagram's V. O. Canadian Whisky, 86.8 proof, quart bottles, 6 years old	0	\$5.00
(b) One case of Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(c) One case of Canadian Club Canadian Whisky, 86.8 proof, 1.75 liter bottles, 6 years old	0	5.00
(d) Two cases of Ron Bacardi Superior Puerto Rican Rum (silver label), 80 proof, 1.75 liter bottles	0	8.00
(e) One case of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(f) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) One case of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(h) One case of Seagram's Crown Royale, Canadian Whisky, 80 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"II

"Count II

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Leland R. and Sally C. Chew, dba South Shore Liquors, 549 W. Plaza, Alameda, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19226</u>
(a) Four cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	\$5.00
(b) One case of Ron Bacardi Superior Puerto Rican Rum (Silver Label), 80 proof, 1.75 liter bottles	0	8.00
(c) Two cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label Scotch Whisky, 86.8 proof, quart size bottles	0	5.00
(f) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(g) One case of Jim Beam Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"III

"Count III

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Best Buy Bottles, Inc., 6111 Meridian Avenue, San Jose, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19219</u>
(a) Three cases of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	\$5.00
(b) Three cases of Canadian Club, Imported Canadian Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bouborn Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(d) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(e) Two cases of Wild Turkey, Straight Bourbon Whiskey, 101 proof, 750 ml. size bottles	0	5.00
(f) One case Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"IV

"Count IV

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to M. Beacon & A. Domingo, dba Village Bottle Shop—R.C., 504 El Camino Real, Redwood City, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19221</u>
(a) Six cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	\$5.00
(b) Two cases of Grand Marnier, Liqueur, 80 proof, 23 oz. size bottles	0	5.00
(c) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 1.75 liter size bottles	0	5.00
(d) Two cases of Jim Beam, Kentucky Straight Bourbon Whiskey, 80 proof, 750 ml. size bottles	0	5.00
(e) Two cases Seagram's V. O. Canadian Whisky, 86.8 proof, 1.75 liter size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"V

"Count V

"On or about July 26, 1979, the above-named rectifier did sell distilled spirits to Erika and John Davis, dba Skyline Bottle Shop, 11893 Skyline Boulevard, Oakland, an off-sale general retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount schedules on file with the Department of Alcoholic Beverage Control, to-wit:

	<u>Posted Discount Per Case</u>	<u>Discount Allowed Per Case On Invoice # 19214</u>
(a) One case of J & B Scotch Whisky, 86 proof, 750 ml. size bottles	0	\$5.00
(b) One case of Liqueure Galliano, Liqueur, 70 proof, 23 oz. size bottles	0	5.00
(c) Three cases of Kahlua, Mexican Coffee Liqueur, 53 proof, 23 oz. size bottles	0	5.00
(d) One case of Hennessy Bras Arms, Cognac V.S., 80 proof, 750 ml. size bottles	0	5.00
(e) One case of Johnnie Walker Red Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(f) One case of Johnnie Walker Black Label, Scotch Whisky, 86.8 proof, 750 ml. size bottles	0	5.00
(g) Five cases of Seagram's V.O. Canadian Whisky, 86.8 proof, quart size bottles	0	5.00

in violation of section 24756 of the Business and Professions Code, State of California, and rule 100, title 4, California Administrative Code.

"VI

"Respondent has been licensed as indicated above since April 26, 1965. There is no record of any disciplinary action against the respondent."

DETERMINATION OF ISSUES:

1. Respondent has challenged the validity and enforceability of rule 100 on various grounds. Section 3.5 of article III of the California Constitution provides as follows:

"Section 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

This provision of the California Constitution prohibits the Department of Alcoholic Beverage Control from declaring rule 100 invalid. For this reason, respondent's objection to the validity of rule 100 are overruled.

2. Counts I, II, III, IV and V—As to each count, respondent violated section 24756 of the Business and Professions Code, and rule 100, title 4, California Administrative Code. Cause for discipline exists as to each count pursuant to Business and Professions Code section 24200, subdivisions (a) and (b), and section 22 of article XX of the California Constitution.

ORDER:

The license is suspended for ten (10) days as a penalty for each count; provided, however, that execution of the suspensions shall be stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty; and that should no such determination be made, the stay shall become permanent. The suspensions ordered hereunder shall be concurrent.

Dated at: San Francisco, California
November 7, 1980

/s/ PHILIP V. SARKISIAN
Administrative Law Judge
of the Office of
Administrative Hearings
State of California

PVS:lhj

Appendix D

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XXI.

Section 2.

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Sherman Act, 15 U.S.C.

Section 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . ."

27 U.S.C. § 121.

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 122.

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted,

fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

California Constitution, Article 20

Sec. 22. The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic

beverages specified in the licenses may be sold and served for consumption upon the premises.

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the

director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the

decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

Business and Professions Code § 23402

No retail on- or off-sale licensee, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale, from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

Business and Professions Code § 23815

Public welfare and morals. It is hereby determined that the public welfare and morals require that there be a limitation on the number of premises licensed for the sale of distilled spirits.

Business and Professions Code § 24013

Protests may be filed at any office of the department at any time within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at such premises.

The department may reject protests, except protests made by a public agency or public official or protests made by the governing body of a city or county, if it determines such protests are false, vexatious, or without reasonable or probable cause at any time before hearing thereon, notwithstanding the provisions of Section 24016 or 24300. The department shall also reject any protests against an off-sale beer and wine retail alcoholic beverage license which are based on evidence, information or conditions resulting from operation of the premises, such as operating hours, parking availability or operating noise, not resulting solely from the sale of alcoholic beverages. If the department rejects a protest as provided in this section and issues a license, a protestant whose protest has been rejected may, within 10 days after the issuance of the license, file an accusation with the department alleging the grounds of protest as a cause for revocation of the license and the department shall hold a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Nothing in this section shall be construed as prohibiting or restricting any right which the individual making the protest might have to a judicial proceeding.

This section shall remain in effect until January 1, 1984, and as of such date is repealed.

Business and Professions Code § 24400

Notwithstanding any other provision of law, two or more retail licensees of the same type may agree to group purchase distilled spirits and wine from a licensed wholesaler or rectifier through a designated agent, subject to the following restrictions:

(a) The designated agent shall hold a retail license of the same type operating a premises in the same county or counties as the purchasing group.

(b) No retailer shall have more than one designated agent nor shall an agent make purchases for more than one group.

(c) The merchandise purchased for each group shall be delivered to and stored in either a single licensed premises or a single warehouse located in the same county as the premises of the purchasing group and such delivery shall be a single delivery within two consecutive business days at the discount in effect on the day the delivery was commenced. Saturday, Sunday, and holidays shall not be deemed business days.

(d) A record of purchase shall be made by the agent on a master purchase order. Each purchasing retailer shall furnish the designated agent with a signed order setting forth such licensee's purchase, to be attached to and become a part of the master order. Master and individual orders shall be maintained in compliance with Section 25752 and fiscal liability shall extend in so far as the amount of the purchase designated and delivered for each individual retailer of the purchasing group is subject to the provisions of Section 25509.

(e) The merchandise shall be deemed to have been received by each retailer member of the purchasing group when delivered to the designated premises.

(f) When a group buying member has not made payment in full by the expiration of the 30th day from date of delivery or has not paid the one percent charge at the expiration of the 30th day from the date the charge became due, such group buying member shall be expelled from the buying group and prohibited from rejoining that group or joining any other such group until such time that all payments have been received for the merchandise sold and delivered to such retailer more than 30 days previously.

Business and Professions Code § 24756

Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by licensee. Domestic brandy shall not be assorted with other distilled spirits for quantity discounts, except that imported brandy, upon which duty is paid, may be assorted for quantity discounts only with imported distilled spirits upon which duty is paid. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

Business and Professions Code § 25500

No manufacturer, winegrower, manufacturer's agent, rectifier, California winegrower's agent, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person shall:

(a) License

(a) Hold the ownership, directly or indirectly, of any interest in any on-sale license.

(b) Financial aid

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

(c) Furniture, fixtures, etc.

(c) Own any interest, directly or indirectly, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in or of any premises operated or maintained under any on-sale license for the sale of alcoholic beverages for consumption on the premises where sold; or own any interest, directly or indirectly, in realty acquired after June 13, 1935, upon which on-sale premises are maintained unless the holding of the interest is permitted in accordance with rules of the department. . . .

Business and Professions Code § 25502

No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:

(a) Hold the ownership, directly or indirectly, of any interest in an off-sale general license.

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale general licensed premises.

(c) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, or trusteeship, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in premises licensed with an off-sale general license.

(d) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, trusteeship, or mortgage of the realty upon which an off-sale general licensed premises is maintained.

Any wholesaler in counties not to exceed 15,000 population who holds both a beer and wine wholesaler's license and an off-sale general license and who held such licenses prior to September 19, 1947, may continue to hold such licenses or may transfer either or both licenses to another individual, individuals, partnership, corporation or other legal entity. Where both licenses are simultaneously transferred to an individual, individuals, partnership, corporation or other legal entity, the transfer shall be a person-to-person transfer only.

Nothing in this section prohibits any holder of a distilled spirits manufacturer's, manufacturer's agent's, California winegrower's agent, rectifier's, or wholesaler's license, or any officer, employee, or representative of any such licensee, from acting as a trustee for any off-sale general licensee in any bankruptcy or other proceedings for the benefit of the creditors of the off-sale general licensee.

Nothing in this section shall alter, change, or otherwise affect, retroactively or prospectively, any of the rights or privileges granted to a winegrower or brandy manufacturer by Section 23362 of this code, or by any other provision of this division.

(b) Financial aid

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

(c) Furniture, fixtures, etc.

(c) Own any interest, directly or indirectly, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in or of any premises operated or maintained under any on-sale license for the sale of alcoholic beverages for consumption on the premises where sold; or own any interest, directly or indirectly, in realty acquired after June 13, 1935, upon which on-sale premises are maintained unless the holding of the interest is permitted in accordance with rules of the department. . . .

Business and Professions Code § 25502

No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:

(a) Hold the ownership, directly or indirectly, of any interest in an off-sale general license.

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale general licensed premises.

(c) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, or trusteeship, in the business, furniture, fixtures, refrigeration equipment, signs, except signs for interior use mentioned in subdivision (g) of Section 25503, or lease in premises licensed with an off-sale general license.

(d) Own or control any interest, directly or indirectly, by stock ownership, interlocking directors, trusteeship, or mortgage of the realty upon which an off-sale general licensed premises is maintained.

Any wholesaler in counties not to exceed 15,000 population who holds both a beer and wine wholesaler's license and an off-sale general license and who held such licenses prior to September 19, 1947, may continue to hold such licenses or may transfer either or both licenses to another individual, individuals, partnership, corporation or other legal entity. Where both licenses are simultaneously transferred to an individual, individuals, partnership, corporation or other legal entity, the transfer shall be a person-to-person transfer only.

Nothing in this section prohibits any holder of a distilled spirits manufacturer's, manufacturer's agent's, California winegrower's agent, rectifier's, or wholesaler's license, or any officer, employee, or representative of any such licensee, from acting as a trustee for any off-sale general licensee in any bankruptcy or other proceedings for the benefit of the creditors of the off-sale general licensee.

Nothing in this section shall alter, change, or otherwise affect, retroactively or prospectively, any of the rights or privileges granted to a winegrower or brandy manufacturer by Section 23362 of this code, or by any other provision of this division.

Business and Professions Code § 25503**Prohibition**

No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall do any of the following:

(a) Conditional Sales

(a) Directly or indirectly, deliver the possession of any alcoholic beverages to any on- or off-sale licensee under an agreement of consignment whereby title to the alcoholic beverages is retained by the seller or whereby the licensee receiving the alcoholic beverages has the right at any time prior to sale to relinquish possession to or return them to the original seller.

(b) Free goods

(b) Directly or indirectly, give any licensee or any person any alcoholic beverages as free goods as a part of any sale or transaction involving alcoholic beverages.

(c) Secret rebates or concessions

(c) Give secret rebates or make any secret concessions to any licensee or the employees or agents of any licensee, and no licensee shall request or knowingly accept from another licensee secret rebates or secret concessions.

(d) Gifts

(d) Give or furnish, directly or indirectly, to any employee of any holder of a retail on-sale or off-sale license only anything of value for the purpose or with the intent to solicit, acquire, or obtain the help or assistance of the employee to encourage or promote either the purchase or the sale of the alcoholic beverage sold or manufactured by the licensee giving or furnishing anything of value, and any employee who accepts or acquires anything of value contrary to the provisions of this subdivision is guilty of a misdemeanor.

(e) Discrimination

(e) Willfully or knowingly discriminate, in the same trading area, either directly or indirectly, in the price of any brand of distilled spirits sold to different retail licensees purchasing under like terms and conditions.

(f) Advertising

(f) Pay, credit, or compensate a retailer or retailers for advertising, display, or distribution service in connection with the advertising and sale of distilled spirits.

Title 4, California Administrative Code, § 100.

Distilled Spirits Price Posting.

(a) Each manufacturer, rectifier or wholesaler who sells or distributes distilled spirits in this State to retailers shall file and maintain with the department, in triplicate, and in such form as the department may prescribe, a written price schedule showing the price per case at which distilled spirits will be sold or distributed, and the discounts offered by such person to retail licensees within the State.

Such schedules shall be filed by eligible licensees at the time their license is issued and before any sales are made, and shall be effective immediately upon filing with the department at its headquarters office, 1215 O Street, Sacramento 95814. When a manufacturer, rectifier or wholesaler license is transferred from one legal entity to another, new price posting and quantity discount schedules shall be submitted by the new licensed entity before any sales are made. Such schedules shall become effective immediately upon filing with the headquarters office of the department.

Distilled spirits single case price posting schedules and quantity discount schedules once filed with the department will remain in effect until superseded or withdrawn by a superseding schedule.

All quantity discount schedules shall be accompanied by an Index which records (a) which quantity discount sched-

ules are continued without change, (b) which schedules are to be changed effective the first day of the following posting period and (c) which are to be discontinued entirely by a superseding schedule accompanying the Index. For any posting period for which an Index is not submitted, all discount schedules previously filed shall remain in effect and no new or superseding discount schedules will be accepted for that posting period.

(b) Definitions. (1) The term "posting period" as used herein shall be two consecutive calendar months starting with the first day of January, March, May, July, September or November.

(2) The word "brand" as used herein means "brand, trademark, label or name," as shown on the primary label, and if an additional secondary name or a different shape or color of label is used, each will be considered to be a separate brand.

(3) The "same type" of distilled spirits is one identical in all of the following categories: (A) type of distilled spirits, including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (B) percentage of straight whiskey; (C) age, if shown on the label; (D) proof; (E) origin (domestic or imported); (F) bottle size; and (G) number of bottles in a case.

(4) A "competitive brand" is a brand of the same type of distilled spirits for which a change in price is being filed and for which there is on file a price schedule sheet filed by some other licensee showing a price per case for the competitive brand which is within three dollars (\$3) per case of the price being charged by the licensee filing the competitive posting.

(5) "Trade journals" or "industry price books of general circulation" are trade journals or industry price books published for the dissemination of information of interest

to persons selling, dealing in, distributing, producing, manufacturing, dispensing, possessing for resale, or transporting alcoholic beverages, which publications have bona fide subscription lists of paying subscribers, and which have been established, printed, and published at regular intervals in this State for at least one year.

A list of publications determined by the department to qualify as trade journals or industry price books of general circulation may be obtained from the Sacramento office of the department. Publications desiring to be determined as constituting trade journals or industry price books of general circulation in this State may petition the department for such a determination.

For the purposes of this rule, interstate common carriers and purchasers located on military and federal reservations are not to be deemed "retailers."

(c) Amendments to price schedules may be deposited in the United States mail, addressed to the department, or placed on file in the Sacramento office of the department on or before the fifteenth day of December, February, April, June, August or October, to become effective on the first day of the posting period following the filing thereof. Such amendments to price schedules shall not be available for public review until on and after the sixteenth day of the month in which they are submitted, except that when the provisions of paragraph (1) below apply, the schedules shall be available for review on the first working day after the filing date is determined by that paragraph.

(d) No manufacturer, rectifier or wholesaler of distilled spirits shall file a price schedule on which is shown a selling price per case at less than the cost thereof to such manufacturer, rectifier or wholesaler, in violation of the California Unfair Practices Act.

(e) Prices may be filed below the manufacturer's, rectifier's or wholesaler's cost, as defined in the California

Unfair Practices Act, when such prices are filed to meet, in good faith, legal prices filed with the department on similar distilled spirits by a competing manufacturer, rectifier or wholesaler.

(f) Manufacturers, rectifiers or wholesalers can meet competitive prices on similar distilled spirits of a "competitive brand" of distilled spirits by depositing in the United States mail, addressed to the department, or placing on file in the Sacramento office of the department, on or before the fifteenth day of any posting period, an amendment to their effective price schedule which lowers their price or prices per case or increases their quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for a similar item of the competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective. Manufacturers, rectifiers or wholesalers can meet competitive prices on the same brand, type and size container of distilled spirits by amending their effective price schedule at any time to become effective at the same time the competitive price for the same brand, type and size of container shall become effective, or immediately if such competitive price schedule shall have become effective, or immediately if such competitive price schedule shall have become effective. Competitive schedules expire at the end of the posting period in which they were effective.

A quantity discount filed to meet competition may not be filed in an amount that would reduce the net price of the brand, type or size container below the net price of the competitive brand for the same quantity.

(g) (1) A quantity discount may be offered on a sale of two or more cases, whether original cases or assorted cases, and on each package in excess of two cases on a pro rata basis, except that imported distilled spirits, upon which duty is paid may not be assorted with domestic distilled

spirits, and domestic brandy may not be assorted for discount with any other type of distilled spirits.

The following containers are substantially the same size and for the purposes of quantity discounts are interchangeable: one half-gallon with 1.75 liters, one quart with one liter, one fifth with 750 milliliters, 24 ounces with 750 milliliters, one pint with 500 milliliters, one tenth with 500 milliliters, and one half-pint with 200 milliliters.

(2) All postings, including quantity discount schedules, are public records.

(3) Quantity discounts filed must be understandable and enforceable by the department. Quantity discounts filed in conformity with any of the following three schedules will be presumed to be understandable and enforceable:

(A) Schedule A, Brand Discounts. Quantity discounts may be filed for a single brand. All sizes of the brand are assortable, if so specified. The brand may not assort with another brand in this schedule.

The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules B and C.

(B) Schedule B, Multiple Brand Discounts. Quantity discounts may be filed for brands of distilled spirits owned or controlled by the same person when grouped together in the schedule at the same or different discount rates than in Schedules A or C.

The brands and sizes filed in this schedule may also be combined into one or more assortments of brands and sizes as specified. However, if a brand is included in more than one Schedule B assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

No Schedule B assortment shall be used or combined for quantity with any other Schedule B assortment.

The discounts filed in this schedule shall not be used or combined for quantity with those discounts filed in Schedules A and C.

(C) Schedule C, Special Size Discounts. Quantity discounts may be filed for a single brand or brands of distilled spirits owned or controlled by the same person for not more than any two sizes at the same or different discount rates than in Schedules A or B.

If a brand and size is included in more than one Schedule C assortment, the discount must be identical for each of the sizes and quantities filed in those assortments.

No Schedule C assortment shall be used or combined for quantity with any other Schedule C assortment.

No Schedule C assortment shall be used or combined for quantity with those discounts filed in Schedules A and B.

Filing licensees are to indicate directly below each schedule all explanatory statements they consider applicable to that posting, such as: sizes assort; sizes do not assort; brands and sizes assort; brands and sizes do not assort.

Any quantity discount which does not conform to the schedules set forth above shall be separately filed and clearly identified no later than the first day of December, February, April, June, August or October to be effective on the first day of the next posting period.

If the filing is found to be defective, it will be rejected, setting forth the reasons for the rejection.

(4) Tie-in sales are prohibited. No discount, or any portion thereof, on any distilled spirits in any quantity or quantities, shall in any way, directly or indirectly, be predicated upon, or conditioned upon, the purchase of any other distilled spirits.

(5) Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way, directly or indi-

rectly, disseminates distilled spirits quantity discount information for any brand, to retail licensees served by him, shall, in any such material, include all quantity discounts filed by him for such brand. If a filing licensee so publishes, mails, delivers, distributes, advertises or in any other way, directly or indirectly, disseminates such information on all quantity discounts filed by him for any brand, he shall disseminate such information to all retailers served by him.

(6) The publication, mailing or delivering of any written material containing less than all of the quantity discounts posted for any brand by a filing licensee shall be deemed a violation of this rule.

(7) The mailing or delivering of written lists of quantity discounts to selective retail licensees rather than to all such licensees served by the filing licensee shall be deemed a violation of this rule.

(8) The publication of all quantity discount schedules filed with the department by a filing licensee, on or before the effective date thereof, in one or more trade journals or industry price books of general circulation among retail licensees in this State, or in parts or trading areas of this State, shall be deemed sufficient compliance with the provisions of subparagraphs (5), (6) and (7) of this paragraph.

(9) Notification to retail licensees of quantity discount schedules by a method other than by publication in a trade journal or industry price book shall be accomplished on or before the effective date of such quantity discount schedules.

(10) The quantity discounts on a brand sold only to one retailer need not be published.

(h) A quantity discount sale is a single order for delivery within two consecutive business days to a licensed retailer at the premises of the distributor, or to the same premises of the licensed retailer at the discount in effect on the day the delivery was commenced. Saturdays, Sundays and holidays are not to be deemed as business days.

(i) In the computation of quantity discounts the word "case" as used in this rule shall mean: 3 full gallons, 6 half-gallons, 12 quarts, 12 packages containing more than one pint but not more than one fifth, 24 packages containing more than one-half pint but not more than one pint, and 48 half-pints. When packages are in metric sizes, "case" shall mean: 6 as to 1.75 liter, 12 as to liters or 750 milliliters, 24 as to 500 milliliters, and 48 as to 200 milliliters.

(j) Any manufacturer, rectifier or wholesaler may at any time file with the department written price schedules showing the price per case and the quantity discount offered on any new brand of distilled spirits, or on any distilled spirits which are not the "same type" as those currently on file by that licensee, to become effective immediately.

(k) No manufacturer, rectifier or wholesaler shall advertise or offer for sale or sell distilled spirits to retailers at a price or quantity discount other than the price or quantity discount provided for by his price schedules or amendments thereto on file with the department.

(l) Whenever the fifteenth day of the month falls on a Saturday, Sunday or a legal holiday, the distilled spirits price schedules required to be placed on file in the Sacramento office of the department may be filed or placed in the United States mail addressed to the department not later than the close of the next business day.

(m) Pursuant to an order issued by the department, any distilled spirits price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements or any order issued by the Federal Government relating to price control.

(n) If any paragraph, sentence, clause or phrase of this rule is for any reason declared invalid, such decision shall not affect the validity of the remaining provisions of this rule.

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Appendix E

Before the
Department of Alcoholic Beverage Control
of the State of California

File: 48292

Reg. No. 12952

N-14920

In the Matter of the Accusation
against

Lewis-Westco & Co.
3003 Third Street
San Francisco, Calif.

Still, Rectifiers, Beer & Wine Importer,
Distilled Spirits Importer,
and Beer & Wine Wholesaler,
Respondent.

Under the Alcoholic Beverage Control Act.

Mr. Leraul: Other than moving to have the exhibits attached to my hearing brief admitted into evidence, with the—I don't know if exhibit 1 needs to be; it's for your convenience, being copies of 2 through 5—and I would like those.

Mr. Tipton: No objection.

Adm. Law Judge: Exhibit A is admitted.

Did you have anything further? Anything further before we adjourn as far as you're concerned?

Mr. Leraul: I have no more evidence to put on. Obviously our position is that this rule is invalid. I have covered a lot of this in the brief.

There is one thing I would like to strengthen and add to what is in the brief with regard to assortments. My reading of the Rule 100 suggests that other assortments than single brand line assortments are permitted. Testimony today has established that such assortments are rejected by the department. In fact, they are not. So the brief was addressed to a presumption in favor of single brand discounts, and a favoritism to that type of discount because the way I read the rule, those discounts only have to be filed fifteen days before the effective date, while other types of discounts, whatever they might be, have to be filed thirty days before.

Testimony today, of course, establishes that assortments of cross-brand lines are not permitted at all, and that I think defends the argument we have made in the brief, that this policy is entirely arbitrary. It furthers no interest in the State, and is something that advances the brand owner's interest in selling the whole line and favors them over people with more limited lines.

Such rule also is tying in, a price violation, in view of the fact that the entire California market you cannot assort across brand lines; effectively ties those products together, encourages retailers to purchase along that line, and not to purchase another person's product.

It is also a price discrimination which is entirely unrelated to cost savings which would be a Robinson-Patman violation.

Going back to Rice, of course once you have established that would have been an anti-trust violation, the compensation interests of the state are absent, and are really the wholesaler being promoted over the distiller.

The other points—these again are spelled out in greater detail in the brief, but the price posting itself was struck down by Rice. Rice invalidated the underlying rationale for the whole of Chapter 10, which included all of the price

fixing statutes regarding distilled spirits, including 24756, which is the basis of Rule 100, and the basis for part of this accusation. I mean, the accusation is under Rule 100 and 24756.

The Legislature in the beginning of Chapter 10 declared its policy to fix prices. Rice said that purpose is no longer valid. So Rice has done what Sandy thought it had done; it had eliminated price posting.

And secondly, price posting is a type of price fixing. For sixty days, even though individual wholesalers establish these prices, those prices are fixed by the state for sixty days. It is a power which has not been granted to the department, to fix prices.

The Schenley case discusses that when they attempted to regulate the depth of discount. Similarly here there is no power in the department to lock prices for sixty days and schedule when they can be made.

And those points have been a little more fully explained in the brief. And the respondent would rest.

Adm. Law Judge: Thank you, Mr. Leraul.

Mr. Tipton, anything further?

Mr. Tipton: No, your honor. I would like an opportunity to review the hearing brief and if I could have five days to file a memorandum addressing some of the arguments raised in respondent's brief—other than that, I would rest and the matter could be submitted.

Adm. Law Judge: All right; I'll hold the record open five days for that purpose.

Mr. Leraul: Pardon me. I think to fully explore the issues I would like another five days to respond to additional points that he might raise.

Adm. Law Judge: Very well. Mr. Tipton has the burden, and along with that he gets the final argument, so if

there is anything to respond to Mr. Leraul's brief you'll have five more days after that.

Mr. Tipton: All right, your honor. I may be—after I have the opportunity to review the respondent's hearing brief I may not—I may not choose to file a memorandum. I just want the time. But I understand counsel has five days to respond and I have five days to close.

Adm. Law Judge: All right. Unless there is something further, we'll stand adjourned.

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Before the
Department of Alcoholic Beverage Control
of the State of California

File 48292

Reg. 12952

In the Matter of the Accusation Against Lewis-Westco
& Co., Respondent.

HEARING BRIEF

FACTUAL BACKGROUND

In May, 1978, the California Supreme Court held that price posting required by Business and Professions Code Section 24755 violated federal restraint of trade laws and was therefore invalid. *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431 (1978). In *Capiscean Corp. v. Alcoholic Beverages Control Appeals Board*, 87 Cal. App.3d 996 (Jan., 1979) and *Mid Cal. Aluminum, Inc. v. Baxter Rice*, 90 Cal.App.3d 979 (March, 1979) the Court of Appeal, both times relying upon *Rice*, held the wine price maintenance statutes similarly invalid.

In July, 1979, Lewis-Westco & Co. made the sales alleged in the accusation. These transactions can be described in two ways. They can be characterized as being in accordance with Lewis-Westco & Co.'s quantity discount for orders of ten cases or more, except that the products assorted in a manner contrary to the rule. Or these sales can be characterized as being sales of individual cases

below the posted price. Either characterization makes these sales contrary to Rule 100 of the Alcoholic Beverage Control Department.

This leaves only one issue to be determined by the Department in this hearing. Is Rule 100 valid? It is Lewis-Westco & Co.'s position that Rule 100 is not valid, and therefore no fine or action may be taken by the Department against Lewis-Westco's licenses as a result of making the sales described in the accusation.

To assist in the analysis of Rule 100, the remainder of this brief is divided into two sections. The first addresses the deficiencies of that rule with regard to the limitations and presumptions concerning assorting of products for quantity discounts. The second section addresses the deficiencies in the posting requirements.

SUMMARY OF THE ARGUMENT

Since the *Rice* case was decided, California courts have consistently stricken the laws and rules that have the effect of restraining competition in the alcoholic beverage industry where the restraints serve the interest of the oligopolist within the industry and not the interests of the state. *Rice* explicitly struck down retail price fixing for liquor and, as we will discuss shortly, simultaneously struck down all of chapter 10 of the Alcoholic Beverage Control Act. *Capiscean* overturned retail price maintenance as they related to wine. *Mid Cal Aluminum v. Rice* extended *Capiscean* and invalidated wholesale price maintenance provisions as they related to wine. *Norman Williams & Company v. Rice*, 108 Cal.App.3d 348 (1980), which empowered distillers to prohibit interstate trade between Oklahoma wholesalers and importers licensed by this state was similarly stricken.

In each case in the above series, the Courts determined that the statute and rules in question constituted restraint of trade which violated the federal commerce policy of

free competition. After analyzing the state's interest in the law in question, the Courts found the state's involvement to be remote, and that its purpose for the rule was not being achieved thereby.

Rule 100 of Title IV of the California Administrative Code as amended in effect on July 2, 1979, is set forth in Appendix 1 hereto. That rule gives a presumption of validity to quantity discounts which are limited to a single brand or to brands owned or controlled by the same person. That presumption of validity and the preference given to such quantity discounts works a restraint on free competition while achieving no result in which the state has a legitimate interest. To encourage assortments to be limited to brands of a single owner serves only the interest of that brand owner. Such assortments have the same illegal effect as tying arrangements. Such assortments are unrelated to actual savings of the wholesaler from quantity orders and therefore violate the price discrimination prohibitions of the Robinson-Patman Act.

Furthermore, by favoring assortments of a single brand owner's products, Rule 100 goes beyond the Department's authority. The statute fully describes what assortments are prohibited for the purposes of giving quantity discounts. Section 24756 of the Business and Professions Code provides that "domestic brandy shall not be assorted with other distilled spirits for quantity discounts," and that "imported brandy, upon which duty is paid, may be assorted for quantity discounts only with imported distilled spirits upon which duty is paid." No other authority to control, encourage, or discourage assortments is granted to the Department by the Act.

Secondly, any rule limiting assortments based upon who owns the brand is arbitrary, capricious, and in violation of the Constitutional rights of due process and equal protection. Such a rule favors only large distillers who have numerous brands and large wholesalers who carry

complete lines. Such a rule discriminates against the smaller retailer who does not carry complete lines from each brand owner.

Alternately, the accusation can be analyzed as a violation of the requirement to post prices. Such a shift in analysis though does not give the accusation any sounder footing. The requirement to post future prices tends to eliminate price competition and has in fact over the years this law has been on the books tended to eliminate price competition either within a single brand or between leading brands of the same type of distilled spirit. Such a price stabilization effect has been condemned by federal commerce policy, and in *Rice*, *Capiscean*, and *Mid Cal* such price stabilization has been found ineffective in advancing any legitimate state interest.

Furthermore, *Rice* not only invalidated retail price fixing in distilled spirits, it also invalidated all of chapter 10 by declaring the underlying purpose of that chapter to be contrary to federal antitrust policy. The goal of chapter 10 is to stabilize prices. That goal is diametrically opposed to federal antitrust policy. Furthermore, in *Rice* and in the subsequent cases, the courts have held that price stabilization did not achieve the overall goal of the Alcoholic Beverage Control Act of promoting temperance and protecting the small retailers. Since *Rice* has overturned the statutory underpinning of Rule 100, it is beyond the Department's authority to prosecute this accusation based upon that rule.

The Department further exceeded its statutory authority by establishing fixed dates and terms when posted prices would be effective. Such price posting constitutes a form of price fixing which has been found to exceed the Department's authority. The fact that wholesalers initially established these prices does not alter the fact that Rule 100 constitutes price fixing.

The Supreme Court in *Rice* analyzed the effect of price fixing in accomplishing the state's declared goals. The court began by noting that price fixing is a *per se* violation of the Sherman Act, citing *Schwegmann Brothers v. Calvert Corp.*, 341 U.S. 384, 95 L.Ed. 1035 (1951); and then analyzed whether the goal of the state in fixing prices was of a significance that would justify an exception to the Sherman Act's prohibition on price fixing. In that balancing process, the court ascertained that:

"what policies are furthered by the State's system of permitting producers to fix retail prices, whether retail price maintenance provisions clearly vindicate those policies and whether and to what degree the policy underlying the Sherman Act is undermined by the State's program." (Page 41)

The Court balanced the declare purpose of the legislature to prevent price competition, which policy is clearly in conflict with the policy underlying the Sherman Act against the effect of price fixing in achieving the goals of temperance and orderly marketing.

* * * *

1. (continued)

The declared policy referred to in the first sentence of 24749 is set forth in 23001 which reads in full: "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of those purposes."

RULE 100 AND BUSINESS AND PROFESSIONS
CODE § 24756 VIOLATE FEDERAL ANTITRUST
POLICY BECAUSE THEY REQUIRE THE
EXCHANGE OF FUTURE PRICE INFORMATION
AND TEND TO ELIMINATE PRICE COMPETITION.

The regular exchange of price information between competitors tends to have an anti-competitive effect on pricing. When that exchange covers future prices to be charged to identifiable customers, such exchange may be a *per se* violation of the Sherman Act. As *Rice* noted with regard to retail prices:

"The price posting system facilitates price fixing among producers. While it may be a *per se* violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed2d 526, 529-530, 89 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices." (Pgs. 455-456)

Rule 100 encourages price fixing by requiring each wholesaler to publish the price he intends to charge in advance. Details of the price to be charged each customer are available before the transaction to any wholesaler.

* * * *

Appendix F

United States District Court
Northern District of California

No. C-81-0068 EFL

Enrico's Inc., a California corporation,
d/b/a "Enrico's Sidewalk Cafe,"
Plaintiff,

vs.

Baxter Rice, Director, Department of Alcoholic Beverage
Control; Wine and Spirits Wholesalers of
Northern California, Inc.
a California association;
Wine & Spirits, Wholesalers of Southern California,
a California association;
Consolidated Enterprises, Inc., d/b/a Rathjen,
a corporation;
Juillard, Inc., d/b/a Juillard Alpha Liquor Company,
a California corporation,
and House of Sobel, a California corporation;
and all other persons similarly situated,
Defendants.

[Filed Nov. 24, 1982]

MEMORANDUM OF DECISION

On cross-motions for summary judgment,¹ this Court confronts the issue of whether the price-posting procedure required by California Business and Professions Code section 24756 and 4 Cal. Admin. Code section 100 (hereinafter collectively referred to as "Rule 100") constitutes a *per se* violation of the Sherman Act, 15 U.S.C. §§ 1, *et seq.* Business and Professions Code section 24756 provides, in relevant part:

¹In addition to summary judgment, plaintiff seeks the entry of a permanent injunction.

Every distilled spirits . . . wholesaler shall file and maintain with the Department [of Alcoholic Beverage Control] a price list showing the prices at which distilled spirits are sold to retailers by the [wholesale] licensee. . . . Sales of distilled spirits to retailers by each distilled spirits . . . wholesaler shall be made in compliance with the price list of the licensee on file with the Department.

Rule 100 provides that each wholesaler who sells or distributes distilled spirits in California must file with the Department of Alcoholic Beverage Control a "written price schedule showing the price per case at which distilled spirits will be sold or distributed, and the discounts offered" by the wholesaler to retailers. 4 Cal. Admin. Code § 100(a). Discounts must be based on quantity and must conform to the formulae set forth in the Rule. 4 Cal. Admin. Code § 100(g). All prices and discounts must be filed at the Sacramento office of the Department by the 15th of the month. On the following day, the filings become publicly available. 4 Cal. Admin. Code § 100(c). It is required that the posted wholesale prices remain in effect for at least a month (4 Cal. Admin. Code § 100(b)), except that a wholesaler has the opportunity to amend its price schedule by *lowering* its price or prices per case or by increasing its quantity discounts to match the lowest submitted price or the highest quantity discount. 4 Cal. Admin. Code § 100(f). Once the posted prices go into effect, the wholesaler is required to sell according to the price schedules or amendments on file with the Department. 4 Cal. Admin. Code § 100(k).

Plaintiff operates a "cafe" which sells distilled spirits in San Francisco, California. Plaintiff has purchased and resold distilled spirits from the wholesaler defendants for over 20 years. Defendants are liquor wholesalers and wine and spirits wholesaler associations. Intervenor, Baxter Rice, is the Director of the California Department of

Alcoholic Beverage Control which, pursuant to statute and its own Rule 100, enforces the challenged regulations.

Plaintiff contends that the requirement that the posted wholesale prices cannot be raised for 30 days is "price-fixing" and, thus, a *per se* violation of the Sherman Act. Plaintiffs rely heavily upon *Sugar Institute v. United States*, 297 U.S. 553 (1936), in which the Supreme Court found an agreement among sugar refiners to adhere to their previously announced prices to be a violation of Section 1 of the Sherman Act.

Defendants posit three arguments in support of their contention that Rule 100 is constitutional. First, they argue that no Sherman Act violation results from the Rule due to lack of the required contract, combination or conspiracy among the wholesalers. Second, defendants contend that the Rule is not a clear *per se* violation of the Sherman Act because it is pro-competitive and neither perniciously affects competition nor lacks redeeming virtue. Finally, the wholesalers argue that Rule 100 is a valid exercise of California's power under the Twenty-First Amendment.

Earlier, Judge Conti refused to apply the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 350-51 (1942) to insulate Rule 100 from the application of the antitrust laws. The Court found that California's involvement in the price-posting program of Rule 100 was insufficient to bring the program within the ambit of the state action doctrine. This conclusion was largely based upon *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). See Order Re: Motion for Partial Summary Judgment, August 27, 1981.

Discussion

This Court finds that Rule 100 does not violate the Sherman Act as it does not mandate conduct which constitutes an antitrust violation. The United States Supreme Court recently stated

that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to comply with the statute.

Rice v. Norman Williams Co., U.S., 50 U.S.L.W. 5052, 5054 (July 1, 1982). See also *Seagram & Sons v. Hostetter*, 384 U.S. 25, 45-46 (1966). A possible anti-competitive effect alone is insufficient to invalidate a state regulation; the regulation on its face must irreconcilably conflict with federal antitrust policy. *Norman Williams*, 50 U.S.L.W. at 5053.

Plaintiff's great reliance on *Sugar Institute* is misplaced. In that case, the members of the Sugar Institute met and collectively agreed to a comprehensive set of restrictions of the sugar industry. The Court found the *agreement* to adhere to previously announced prices and terms of sale to be an antitrust violation. *Sugar Institute*, 297 U.S. at 601-602. This agreement constituted price fixing, a *per se* violation of Section 1 of the Sherman Act.² *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*).

Plaintiff concedes that the instant situation differs from *Sugar Institute*. Here, no clear agreement in restraint of trade is mandated by Rule 100 and it is each defendant's required unilateral compliance with the Rule which underlies plaintiff's suit.³ Plaintiff argues, however, that the

²15 U.S.C. § 1 states in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."

³Failure to comply with the requirements of Rule 100 is grounds for suspension or revocation of a license. 4 Cal. Admin. Code § 1.

State of California somehow constitutes the "glue" which creates the required combination for an antitrust violation, seemingly relying upon *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

Contract, Combination or Conspiracy

A violation of Section 1 of the Sherman Act cannot be based on unilateral action. *United States v. Colgate & Co.*, 250 U.S. 300, 305-6 (1919); Sullivan, *Antitrust*, p. 311 (1977). The section condemns concerted activity only. One court noted that "[i]t is the ability of a private party by contract, combination, or conspiracy to control the price at which another private party can sell a product which the Sherman Act prohibits." *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936, 939 (D.Conn. 1981), *aff'd sub nom Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981).

In *Morgan*, the Second Circuit considered the validity of a Connecticut liquor pricing statute which, among other things, required each manufacturer to post, on a monthly basis, a list of prices for the following month and which required the manufacturer to adhere to those prices set for that month. The state regulation itself established the minimum markup which wholesalers' and retailers' prices were required to reflect. In addition to finding *Parker v. Brown* immunity for the State of Connecticut due to its great involvement in the price arrangement (664 F.2d at 356), the court noted that "the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of § 1 of the Sherman Act." *Morgan*, 664 F.2d at 335.

Similarly, the court in *United States Brewers Association v. Healy*, 532 F. Supp. 1312 (D.Conn. 1982) *rev'd on other grounds*, F.2d, 43 Antitrust & Trade Reg. Rep. (BNA) 907 (2d Cir. Nov. 1, 1982) rejected a challenge to Connecticut's beer price affirmation statute, finding the challenged statute to require only unilateral conduct. The

contested Connecticut statute required Connecticut brewers and beer importers to post their prices and to adhere to their prices for a one-month period. The statute further required each brewer selling in Connecticut to affirm that its prices were no higher than the lowest price offered to any wholesaler in the three bordering states. Reiterating that "[a]bsent an agreement among private parties, there cannot be a violation of Section one of the Sherman Act" (532 F. Supp. at 1329), the court found that "the beer affirmation statute requires only unilateral action by each brewer and importer" and that "[i]t does not exert 'irresistible economic pressure' on the plaintiff to violate the Sherman Act." *Healy*, 321 F. Supp. at 1330.

As in the cases discussed above, plaintiff here relies on *Midcal* to support its contention that unilateral compliance with a state statute is sufficient to constitute a Section 1 violation. This reliance, however, is misplaced.

Explaining its *Midcal* decision, the United States Supreme Court recently stated

In *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), we examined a statute that *required* members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act. *Id.* at 102-103.

Rice v. Norman Williams Co., U.S., 50 U.S.L.W. 5052, 5053 (July 1, 1982) (footnotes omitted) (emphasis in original). The Supreme Court in *Midcal* relied on a long line of cases holding that resale price maintenance is the equivalent of an agreement between wholesalers not to compete. *Midcal*, 445 U.S. at 102.

Clearly, *Midcal* did not eliminate the requirement of an agreement for a Section 1 violation. Although the case was primarily concerned with whether the California wine pricing program was exempted from antitrust liability under *Parker v. Brown* and whether the Twenty-First Amendment provided the state additional power, the Supreme Court found first that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. [cites]." *Id.* at 103. As one court noted

Invariably, the Supreme Court has viewed resale price maintenance as involving an implicit agreement in those instances where an implicit agreement was not shown.

United States Brewers Ass'n, Inc. v. Healy, 532 F. Supp. 1312, 1329 (D. Conn. 1982) *rev'd on other grounds*, F.2d, 43 Antitrust & Trade Reg. Rep. (BNA) 907 (2d Cir. Nov. 1, 1982). Further, the statute at issue in *Midcal*, by its own terms, forced an agreement. The statute *required* the wine producers to fix the minimum prices at which wholesalers could sell the producers' wines. The involvement of the state "was manifested by the requirement that wholesalers and producers set such prices by contract or, in the alternative, that a wholesaler 'post' a price for other wholesalers to follow." *Morgan*, 664 F.2d at 355.

Instead, Rule 100 mandates only unilateral action by each liquor wholesaler, independent activity insufficient to constitute a Section 1 violation. Further, Rule 100 cannot be construed as constituting resale price maintenance since it only requires the liquor wholesalers themselves to adhere to the prices they file.

Shortly before this Court was to have issued its opinion in this case and after the opinion was drafted, the California Court of Appeal for the First District decided *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*,

1 Civil No. 54605 (October 22, 1982). The California Court of Appeal held Section 24756 of the Business and Professions Code and Rule 100 to be violative of Section 1 of the Sherman Act. In reaching this conclusion, the court relied primarily upon *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431 (1978), in which the California Supreme Court invalidated price maintenance provisions which required distilled liquor wholesalers to set minimum retail prices. *Rice*, 21 Cal.3d at 444-459.

This Court does not find *Rice* to be persuasive since the instant situation, unlike that in *Rice*, does not involve resale price maintenance which would provide evidence of an agreement as required for a Section 1 violation. More on point are the federal cases of *Morgan* and *Healy*, discussed above, which convince this Court that no facial restraint appears from the challenged regulations.

In light of the *Lewis-Westco* decision, this Court requested further briefing and argument from the parties regarding whether this Court's opinion was rendered moot. All parties, except intervenor Baxter Rice, argued strenuously that this Court should issue its opinion. In doing so, the Court notes that the defendants herein were denied the opportunity to intervene in the *Lewis-Westco* case.

Although this decision disposes of the major issues in the action, there remains plaintiff's allegation of private price-fixing. This contention is unrelated to plaintiff's challenge to the facial validity of Rule 100 since plaintiff admits that the statute in no way mandates private price-fixing.

The question of whether Rule 100 is facially invalid due to conflict with Section 1 of the Sherman Act raises, in the opinion of this Court, important antitrust issues. This Court's order clearly involves a controlling question of law as to which there is substantial ground for difference of opinion, as evidenced by the contrary conclusions reached

by the California Court of Appeal and this Court. This Court, relying primarily on federal district court and Second Circuit decisions, concluded differently than the state court, which largely relied on state court precedent. This case involves purely federal issues on which this Circuit has yet to speak. Accordingly, this Court finds this order, based upon a single legal issue, to be an ideal candidate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Since Rule 100 states no *per se* violation of Section 1 of the Sherman Act, summary judgment for the defendants is granted. Since this Court finds no agreement on the part of the defendants, it is unnecessary to reach defendants' other arguments.

It is so ordered.

Dated: November 24, 1982.

/s/ EUGENE F. LYNCH
United States District Court
Judge